

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0181, State of New Hampshire v. Moise William, the court on April 17, 2006, issued the following order:

Following a jury trial, the defendant, Moise William, was convicted of two felony offenses involving cocaine and a misdemeanor possession of marijuana. On appeal, he contends that the trial court erred when it excluded a defense witness based upon late disclosure. We affirm.

We review the trial court's imposition of a discovery sanction under an unsustainable exercise of discretion standard. See State v. Cromlish, 146 N.H. 277, 280-81 (2001). A defendant's right to present witness testimony under Part I, Article 15 of the New Hampshire Constitution is entirely dependent upon his affirmative exercise of that right; he may waive the right through inaction. Id. at 283. When considering whether to exclude or limit evidence under Part I, Article 15 as a discovery sanction, the trial court should consider such factors as the probative value and reliability of the proposed evidence, the effectiveness of less severe sanctions, the integrity of the adversary process, the interest in the fair and efficient administration of justice and the potential prejudice to the truth-determining function of the trial process. Id. at 283-84.

In this case, trial had first been scheduled to begin in March 2004. Defense counsel filed a motion to continue based on a trial scheduling conflict; the motion was granted. The trial was rescheduled to June 2004; the defendant's new motion to continue based upon defense counsel's trial schedule was again granted with the admonition that no further continuance would be granted "on the grounds that counsel is too busy." Trial was then rescheduled for October 18, 2004; defense counsel's motion to continue based upon a trial scheduling conflict was denied. A final pretrial conference was held on October 8, 2004.

On October 15, 2004, defense counsel advised the State that he wished to add a witness to his list. See Super Ct. R. 98 C (2) (disclosure deadline for defense witnesses is not later than the final pretrial conference or ten calendar days before jury selection, whichever occurs first). The State filed a motion in limine to exclude the witness. At the hearing on the motion, defense counsel explained that the delay in disclosing the witness was because the defendant had lost touch with him and had run into him "a short while ago." He proffered that the proposed witness had said that he was a co-worker of the defendant, that sometimes he borrowed the van that the defendant was driving when the defendant was stopped and the drugs were found, and that "he would drive various people that were involved in drugs, and in fact used drugs in his presence

and had drugs in the vehicle.” Defense counsel also admitted that the witness had a lengthy criminal record. The trial court granted the motion, noting that the case was a year old, that three final pretrial conferences had been held and that the witness had never been disclosed. The court further based its ruling upon the fact that the State was “unable to track down any of the people that the witness claims used the car, or were in the car and whether or not they were, in fact, drug dealers.”

In addition to the factors cited by the trial court, including the State’s inability to investigate any of the newly discovered evidence, we conclude that the attenuated and non-specific nature of the proffered evidence and the need for the State to obtain certified copies of any convictions that it might use at trial in relation to the newly disclosed witness all support the trial court’s ruling. Accordingly, we affirm.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**